88-1465

No. .....

Supreme Court, U.S.
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In the Supreme Court
of the United States

OCTOBER TERM, 1988

GREGORY TIMBER RESOURCES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Where the United States Is Seeking Lost Profits from a Private Contractor Under the Contract Disputes Act, 41 USC § 601, et seq., and No Money Damage Claim Is Being Made Against the United States, Is the Private Contractor Entitled to Have Its Liability Determined De Novo by an Article III Judicial Court and Not by an Executive or Legislative Tribunal?

2. Where the Contract Disputes Act Declares a Contracting Officer's Decision Unreviewable by Any Court or Tribunal Other Than the Article I Claims Court or an Article I Agency Board Of Contract Appeal, Does a Contractor Waive Its Right To Claim Entitlement to an Article III Adjudication by Making That Argument Before an Article I Agency Board Instead of Before the Article I Claims Court?

3. Where a Contracting Officer Declares a Default and Assesses Damages Based Upon the Mistaken Belief That He Has No Authority To Grant a Contractor's Request for an Extension on the Contract,

   (1) Does the Contract Disputes Act Permit an Agency Board of Contract Appeals To Affirm That Decision by Ignoring Entirely the Contracting Officer's Mistaken Belief, and

(2) Does the Contract Disputes Act Permit a Court of Appeals To Affirm an Agency Board by ITSELF Making Original Findings of Fact Concerning the Contracting Officer's Understanding of His Authority, Where Such Findings Are Directly Contradicted by the Contracting Officer's Sworn and Uncontroverted Testimony at the Trial Before the Agency Board?

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . .

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 4

A. The Facts 4

B. The Proceedings in the Board of Contract Appeals 5

C. The Proceedings in the Federal Circuit . . . 6

REASONS FOR GRANTING THE WRIT . 8

A. The Article III Issues 9

1. Contractors Who File in an Article I Board Instead of the Article I Claims Court Are Entitled to Claim Article III Rights 9

2. The Panel's Failure to Address the Institutional Aspect of the Article III Claim Violates Commodity Futures Trading Com'n v. Schor, 478 US 833, 106 S Ct 3245, 92 L Ed 675 (1986). 12

3. A Contractor Who Makes No Money Damage Counter-claim is Entitled to Defend Against a Government Claim in an Article III Tribunal 13

B. This Court Should Review and Define Under the Contract Disputes Act the Proper Role of Agency Boards and Courts of Appeal. 24

1. The Majority's Decision Is Based upon an Original Finding of Fact Which Has No Support in the Record 26

2. An Appellate Court Cannot Supply an Original Finding Of Fact To Support a Contracting Officer's Decision 26

C. The Importance of This Case 28

CONCLUSION 30

TABLE OF CASES AND AUTHORITIES

Cases

Page

Anderson v. Bessemer City,
470 US 564, 105 S Ct 1504,
84 L Ed 2d 518 (1985) . . . 27

Attorney General v. Cochrane,
145 ER 1154 (1810) 18

Bromley Contracting Co., Inc. v.
United States,
794 F2d 669 (Fed Cir 1986) . 24

Cawthorne v. Campbell,
1 Anst. 205, 145 ER 846
(1790) 18

Commodity Futures Trading
Com'n v. Schor,
478 US 883, 106 S Ct 3245,
92 L Ed 2d 675 (1986) 12,13

Ex parte Bakelity Corp.,
279 US 438, 49 Sct 411,
73 L Ed 789 (1929) 14

FMC Corporation v. U.S.,
____ F2d ____ (Fed Cir 1988) 29

Glidden Co. v. Zdanok,
370 US 530, 82 S Ct 1459,
8 L Ed 671 (1962) 14

Gregory Timber Resources, Inc.,
87-3 BCA (CCH) ¶ 20,086
(AGBCA 1987) 1

Gregory Timber Resources, Inc. v.
U.S.,
855 F2d 841 (Fed Cir 1988) . 1,9

John A. Johnson Contr. Corp.
v. United States,
132 Supp 689 (Ct Cl 1955) . . 28

Mid South Contractors, Inc.,
85-3 BCA (CCH) ¶ 18,210
(VABCA 1985) 28

Murray's Lessee v. Hoboken
Land and Improvement Co.,
59 US (How) 272 (1856) . . . 11,14,
15

North American Com. Co. v.
United States,
171 US 110 (1898) 11

Northern Pipeline Const.
v. Marathon Pipe Line Co.,
458 US 50, 102 S Ct 2858,
73 L Ed 2d 598 (1982) 14,15,
19,21,
22,23,
24

Seaboard Lumber Co. v. U.S.,
15 Cl Ct 366 (1988) 6

Schlesinger v. United States,
390 F2d 702 (Ct Cl 1968) . . 28

United States v. Buchanan,
49 US (How) 83 (1850) 11

United States v. Gurney and Others,
8 US (Cranch) 333 (1808) . . 11

United States v. Linn et al.,
40 US (Peters) 290 (1841) . . 11

United States v. Tingey,
30 US (Peters) 115 (1831) . . 11

United States v. Will,
449 US 200, 101 S Ct 471,
66 L Ed 2d 392 (1980) 13

William F. Klingensmith, Inc. v. U.S.,
731 F2d 805 (Fed Cir 1984) . 27

United States v. North American Commercial Co.,
74 F 145 (CC SD NY 1896) . . 12

Statutes, Rules, and Regulations

41 USC § 601, et seq. 2

41 USC § 605(b) 3,28

41 USC § 606 3

41 USC § 609 27

41 USC § 609(b) 26

41 USC § 609(a)(1) 4

S Ct Rule 20.4 2

S Ct Rule 20.2 2

28 USC § 2101(c) 2

28 USC § 1254(1) 2

United States Constitution
Article III, Section 1 2

Other Authorities

3 Blackstone "Commentaries on The Laws of England" (Dawson's of Pall Mall, 1st ed reprint 1966) 16,17

Federal Court Improvements Act of 1982, Pub L 97-164, § 161(10) 2,3

Miller, "Cases of a Judiciary Nature," 8 St L U Publ L Rev 47 (1989) 19

13 Petersdorff, "A Practical Treatise on the Different Branches of the Common Law" (1830) 17-18

Gregory Timber Resources, Inc. ("GTR"), plaintiff in these consolidated cases, petitions this Court for a writ of certiorari to the United States Court of Appeals for the Federal Circuit to review the judgment in Gregory Timber Resources, Inc. v. U.S., 855 F2d 841 (Fed Cir 1988).

OPINIONS BELOW

The Opinion of the Department of Agriculture Board of Contract Appeals is reported at 87-3 BCA (CCH) ¶ 20,086 (1987) and is reprinted at Section B of the Appendix ("App B"). The Federal Circuit Opinion and Judgment is reported at App A. The order denying GTR's Petition for Rehearing and Suggestion for Rehearing En Banc is unreported and appears at App D.

JURISDICTION

The Opinion and Judgment of the Federal Circuit were respectively issued and entered on August 29, 1988. On September 12, 1988 GTR timely petitioned for rehearing and suggested rehearing en banc. The Federal Circuit denied rehearing and the suggestion for en banc

review on November 30, 1988. Under United States Supreme Court Rule 20.2 and 20.4 and 28 USC § 2101(c), a petition for certiorari is due February 28, 1989. Jurisdiction rests on 28 USC § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, Section 1 of the United States Constitution provides:

> "*** The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

Three subsections of the Contract Disputes Act of 1978, 41 USC § 601, et seq., as amended by the Federal Court Improvements Act of 1982, Pub L No. 97-164 ("CDA"), are relevant here. Section 6(b) of that Act provides:

> "The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an <u>appeal</u> or <u>suit</u> is timely commenced as authorized

> by this chapter." 41 USC § 605(b) (emphasis added).

The "appeal" referred to in Section 6(b) is detailed under Section 7 of the CDA, 41 USC § 606:

> "Within ninety days from the date of receipt of a contracting officer's decision under section 605 of this title, the contractor may appeal such decision to an agency board of contract appeals, as provided in section 607 of this title."

The "suit" referred to in Section 6(b) was originally detailed as a suit in the United States Court of Claims:

> "[I]n lieu of appealing the decision of the contracting officer under section 605 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Claims Court, notwithstanding any contract provision, regulation, or rule of law to the contrary."

The Federal Court Improvements Act of 1982, Pub L No. 97-164, § 161(10), substituted "Claims Court" for "Court of Claims."

STATEMENT OF THE CASE

A. The Facts. United States Forest Service Contracting Officers ("COs") declared defaults and assessed $1,350,354.00 in lost profit damages on two timber sale contracts ("Bonk" and "East Flat Creek") held by Gregory Timber Resources ("GTR"). GTR is a logging business in rural southern Oregon. (Tr. 19-20.) Prior to the default terminations, GTR requested extensions on these contracts in order to log additional timber that had blown down on another Forest Service contract (entitled "North Area Salvage"). (Tr. 41, 100; Exs. 1, 4.) The Forest Service decided on its own that this new damage was catastrophic. (Tr. 124-29, 137; Exs. 29, 30, 31.) The blowdown increased the harvest volume from the original estimate of 1.6 million board feet to 3.7 million board feet. (Tr. 116, 132-33, 136-37; Exs. 25, 28.)

The COs rejected GTR's requests in one day, without independently investigating any of the involved sales

because they mistakenly believed that they had "no authority" to extend the contracts. (App L:96a to 99a; Exs. 2, 5.) The COs incorrectly believed that they had no extension authority because the prospectus for North Area Salvage had not authorized extensions in advance. (App L:96a to 98a.) The blowdown could not have been addressed in that prospectus because it occurred after North Area Salvage had been awarded. (Tr. 124-25; Ex. 29.) The United States never argued that the COs lacked the discretionary authority to extend. (App L:99a to 102a.)

B. The Proceedings in the Board of Contract Appeals.

After the contracts were terminated and damages assessed, GTR appealed to the Department of Agriculture Board of Contract Appeals ("AGBCA"), one of two Article I tribunals made available to contractors under the CDA. GTR claimed the COs' failure to recognize their authority was a material breach of contract, excusing GTR's duties or rendering the terminations ones for the

convenience of the government. GTR also claimed entitlement to trial of its defenses by an Article III court.

The AGBCA held a trial on the merits. The COs testified that they understood, at the time of the decision, that they had no authority to extend these contracts. (App L:95a to 99a; Exs. 2, 5.) Examination by Government counsel revealed that such authority did exist. (App L:98a to 102a.) The AGBCA ignored entirely the COs' acknowledged misunderstanding of their authority and, except for minor adjustments, affirmed the COs' decisions. The AGBCA also rejected GTR's constitutional challenge on the merits.[1]

C. The Proceedings in the Federal Circuit.

On appeal to the Federal Circuit, GTR argued that the AGBCA had

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1 Since then, the Claims Court has also rejected a contractor's claim of entitlement to an Article III trial. Seaboard Lumber Co. v. U.S., 15 Cl Ct 366 (1988). An appeal is pending in the Federal Circuit under No. 88-1486.

erred in failing to address the consequences of the COs' misunderstanding of their authority. GTR also renewed its Article III claim. In a 2-1 decision, the court found that the COs did understand they had authority to extend, and had legitimately exercised discretion in denying extensions. This original finding had neither been urged by the government in its briefs nor addressed by the AGBCA. The Federal Circuit also rejected GTR's Article III claim, holding that GTR had waived its challenge by appearing in an agency board rather than the Claims Court.

In dissent, Judge Bissell concurred in rejection of the constitutional arguments but wrote for reversal on the merits. Acknowledging that the AGBCA had failed to address the issue in the first place, Judge Bissell found that the COs' admitted failure to exercise <u>any discretion</u> was established by undisputed facts and required

converting the terminations to ones for the convenience of the government. (App 17.)

Through a petition for rehearing, GTR challenged the holding of waiver and the majority's original finding that the COs had understood their authority. The court denied the petition with Judge Bissell again dissenting.

REASONS FOR GRANTING THE WRIT

The CDA affects thousands of private contractors and involves hundreds of millions of dollars in transactions every year. Under that Act, a contractor who makes no damage claim against the government is compelled to defend against government claims in an Article I tribunal. This Court should address whether a contractor from whom the United States seeks damages may claim entitlement to an Article III trial regardless of whether he makes that claim in the Claims Court or before an agency board. This Court should also address under the CDA the proper role of agency boards and courts of appeal when

reviewing damage determinations made after a CO misunderstands his authority. The very foundation of the CDA process is a reasoned disposition by an independent CO. Here, the AGBCA and Federal Circuit decisions rendered meaningless the admitted failure of two COs to understand their authority.

A. The Article III Issues.

1. Contractors Who File in an Article I Board Instead of the Article I Claims Court Are Entitled to Claim Article III Rights

Contrary to the Federal Circuit's statement, GTR does not "challenge the constitutionality of the provision of the Federal Courts Improvement Act *** that substituted the United States Claims Court, an Article I Court, for the Court of Claims, an Article III Court." (Gregory Timber Resources, Inc. v. United States, App A:1.) GTR has not argued that the Constitution requires the Claims Court to be an Article III tribunal. What GTR has argued is that when the government seeks damages against a contractor for breach

of contract and no counterclaim is alleged, Article III guarantees that contractor a trial before an Article III, i.e., judicial branch, tribunal. Between 1978 and 1982, that guarantee was satisfied. While the CDA compelled contractors to seek review in one of two forums during that period, one forum was an Article III court. An election to appeal to a contract board of appeals (an Article I forum) constituted a waiver of the right to Article III adjudication because the Article III Court of Claims was available to contractors.

After the Court Improvements Act established the Article I Claims Court in place of the Article III Court of Claims, however, contractors were still subject to the CDA restriction limiting review to either of two forums. Now, though, neither of those forums was an Article III court. The constitutional flaw is not that the Claims Court was established as an Article I tribunal. The flaw instead is that the CDA now entirely denies a contractor the historic

right to defend against a government money damage claim in an Article III tribunal.[2]

With the Court of Claims abolished, today's Article III alternative is a district court. It is the application of the CDA to deny any Article III trial and not the simple establishment of the Claims Court as an Article I tribunal, which is constitutionally offensive. It is absolutely irrelevant to that denial whether a contractor denied access to an Article III district court initiates his claim in the Article I Claims Court or an Article I board. There can be no waiver of an Article III right where the CDA

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[2] See, e.g., North American Com. Co. v. United States, 171 US 110 (1898); United States v. Buchanan, 49 US (How) 83 (1850); United States v. Linn et al., 40 US (Peters) 290 (1841); United States v. Tingey, 30 US (Peters) 115 (1831); United States v. Gurney and Others, 8 US (Cranch) 333 (1808); cf. Murray's Lessee v. Hoboken, 59 US (HOW) 272 (1856).

denies a contractor any option to proceed in an Article III forum.

2. The Panel's Failure to Address the Institutional Aspect of the Article III Claim Violates Commodity Futures Trading Com'n v. Schor, 478 US 833, 106 S Ct 3245, 92 L Ed 2d 675 (1986).

The Federal Circuit also erred in halting its analysis of the Article III issue with the erroneous finding of waiver. Article III not only preserves to litigants a personal right to impartial and independent adjudication, but it "also serves as 'an inseparable element of the constitutional system of checks and balances.'" Commodity Futures Trading Com'n v. Schor, 478 US 833, 106 S Ct 3245, 3257, 92 L Ed 2d 675, 692 (1986). This institutional interest cannot be waived. 92 L Ed 2d at 693. Indeed, in Schor itself, this Court found that while the litigant had waived his personal Article III protections, the Court still had to decide whether the grant of power to try state law counterclaims violated the institutional

aspect of Article III. The Federal Circuit decision is contrary to Schor in its failure to address the institutional aspect.

3. A Contractor Who Makes No Money Damage Counterclaim Is Entitled to Defend Against a Government Claim in an Article III Tribunal.

An action by the government against a citizen for money damages for failure to perform under a government contract, heard and decided in a non-Article III tribunal, implicates the core of the "longstanding Anglo-American tradition of an independent Judiciary." United States v. Will, 449 US 200, 217-18, 101 S Ct 471, 66 L Ed 2d 392 (1980). An independent judiciary within the constitutional scheme of separation of powers safeguards litigants from having their rights decided by judges who are insulated from political domination by the Executive or Legislative Branch. Commodity Futures Trading Com'n v. Schor, 478 US at 848.

Congress cannot withdraw from an Article III court "any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty." Murray's Lessee v. Hoboken Land and Improvement Co., 59 US (18 How) 272, 284 (1856). In other words, Congress cannot relegate an "inherently judicial" matter to a non-Article III court. Ex parte Bakelite Corp'n, 279 US 438, 453, 49 S Ct 411, 73 L Ed 789 (1929); Glidden Company v. Zdanok, 370 US 530, 549, 82 S Ct 1459, 8 L Ed 2d 671 (1962). Most recently this Court has stated that non-Article III courts must be limited "in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." Northern Pipeline Const. v. Marathon Pipe Line Co., 458 US 50, 59, 102 S Ct 2858, 73 L Ed 2d 598 (1982).

Whether a non-Article III court may decide a case is to be analyzed "in light of the historical context in which the Constitution was written, and of the structural imperatives of the

Constitution as a whole." Northern Pipeline Const. v. Marathon Pipe Line Co., 458 US at 64.

Thus, for example, in Murray's Lessee, where the issue was whether treasury officials could audit accounts of customs officials, this Court looked to English law at the time of the Constitutional Convention for guidance as to the nature of the judicial remedies available to the Crown under English law. Because the Court found that English law provided for summary warrants of distress against "public defaulters" like the tax collector, as opposed to a full legal process including jury trials for "ordinary debtors," the Court held that the process of the treasury officials against the customs officer did not require Article III trial.

In this case, English law at the time of the Constitutional Convention establishes that a suit by the government for money damages for breach of contract entitles the citizen-defendant to the full panoply of English rights, including

trial by jury. Sir William Blackstone, in his famed Commentaries first published in 1765, stated that the remedy whereby the Crown could recover money upon a contract was for the king's attorney general to file an "information in debt" in the exchequer court. Regarding such an information and the rights of the subject thereto, Blackstone stated:

> "It is grounded on no writ under seal, but merely on the intimation of the king's officer the attorney general, who 'gives the court to understand and be informed of' the matter in question; upon which the party is put to answer, and trial is had, as in suits between subject and subject." 3 Blackstone, Commentaries on the Laws of England 261 (Dawsons of Pall Mall, 1st ed reprint 1966) (emphasis added).

The English subject is protected from the king's power in this type of proceeding by the entire edifice of English law, the keystone of which is the institution of the jury as guaranteed by the Magna Carta. Blackstone states:

> "For it is a part of the liberties of England, and greatly for the safety of the subject, that the king may not enter upon or seise any man's possessions upon bare surmises without the intervention of a jury." Id. at 259.

Another eminent commentator of the era, Charles Petersdorff, analyzing proceedings initiated by the Crown, stated:

> "Though justice flows from the king as its fountain, he cannot administer it personally, or authorize any deviation from the laws. The first principles of equity forbid that any one should be judge of his own cause; which may be one reason that the constitution has, by an indiscriminate dictate, deprived the crown of the power of personally interfering with the administration of justice. If this were not the case, the [crown's] prerogative, instead of being in fact subservient to, would be above, the laws, and the property of the subject would be

> defenceless." 13 Petersdorff, "A Practical Treatise On the Different Branches Of The Common Law," 698 (1830).

Upon an information on a contract debt the Crown had no prerogative. The information was nothing more than the king's form of action for debt in the exchequer court instead of the common action of debt. Cawthorne v. Campbell, 1 Anst. 205, 145 ER 846 (1790). See, e.g., Attorney General v. Cochrane, 145 ER 1154 (1810) (crown suit by information in exchequer for overpayment against defendant who had supplied tea to the navy). Thus under English law at the time of the Constitutional Convention, an action by the government on a contract debt was essentially an action at common law as "between subject and subject," wherein the party from whom the debt was to be extracted was entitled to all the protections of the common law, including trial by jury.

English common law was the law in the colonies as well as under the Constitution. Indeed, recent scholarship

indicates that the relative lack of debate over Article III at the Constitutional Convention suggests "that there was indeed a strong and broad consensus among the delegates about what courts do and about what they should do." Miller, "Cases of a Judiciary Nature," 8 St L U Publ L Rev 47, 57 n.56 (1989). The Framers of the Constitution cannot have intended United States citizens to enjoy fewer rights than they enjoyed as British subjects.

In this case the United States contends, and the AGBCA held, that Gregory Timber's rights were "public rights," and thus exempt from the exclusive purview of Article III courts. This Court thoroughly discussed the public rights doctrine in Northern Pipeline Const. v. Marathon Pipe Line Co. It stated:

> "The public-rights doctrine is grounded in a historically recognized distinction between matters that could be conclusively determined by the Executive and Legislative Branches and

> matters that are 'inherently . . . judicial.' [Citations omitted] For example, the Court in Murray's Lessee looked to the law of England and the States at the time the Constitution was adopted, in order to determine whether the issue presented was customarily cognizable in the courts. ***
>
> "'[The public rights doctrine applies] only [in] matters the determination of which may be, and at times has been, committed exclusively to executive officers.' [Ex parte Bakelite Corp.,] 279 U.S., at 458, 49 S. Ct., at 416 (emphasis added [by the Court])." Northern Pipeline, 458 US at 69.

The Court noted that at a minimum, matters of public rights must arise "between the Government and others," Northern Pipeline, 458 US at 69, but noted:

> "It is thus clear that the presence of the United States as a proper party to the proceeding is a necessary but not sufficient means of

> distinguishing 'private rights' from 'public rights.'" 458 US at 69 n.23 (emphasis added).

This case is one where the presence of the United States as a party is "not sufficient" to transform this case into one of public rights. No government prerogative applies, and, as Sir William Blackstone noted, in such cases "trial is had, as in suits between subject and subject." This case cannot be one of public rights because it concerns the "inherently judicial" matter of the common law rights of a citizen being sued by the government, which, as shown, are not ones that may be "committed exclusively" to executive officers for determination.

Furthermore, this case is not one of public rights because the contract rights of the United States against Gregory Timber, and Gregory Timber's contract defenses against the United States, are not congressionally created. As stated by this Court:

> "[W]hen Congress creates a statutory right

*** it may also provide that persons seeking to vindicate that right must do so before particularized tribunals created to perform the specialized adjudicative tasks related to that right. Such provisions do, in a sense, affect the exercise of judicial power, but they are also incidental to Congress' power to define the right that it has created. No comparable justification exists, however, when the right being adjudicated is not of congressional creation. In such a situation, substantial inroads into functions that have traditionally been performed by the Judiciary cannot be characterized merely as incidental extensions of Congress' power to define rights that it has created. Rather, such inroads suggest unwarranted encroachments upon the judicial power of the United States, which our Constitution reserves for Art. III courts." 458 US at 83-84 (emphasis added) (foot-note omitted).

At stake in this case are common law contract rights, not congressionally created rights. Certainly Congress can regulate the public lands and authorize its executive officers to enter into contracts with private citizens. This simple fact, however, does not transmute contract rights and defenses against suit by the government into public rights. Suits by the government upon a contract are to be tried as "between subject and subject."

Even if the facts presented in this case "arguably fall within the scope of the 'public rights' doctrine, the presumption is in favor of Art. III courts." Northern Pipeline, 458 US at 69 n.23.

This Court's precedents honor the constitutional principle of an independent judiciary. The Court has emphatically rejected an ad hoc balancing approach to the issue of whether Congress can determine for itself when Article III courts are required, and instead has insisted upon the principled approach as

stated above. 458 US at 70 n.25. Nor has this Court succumbed to arguments of expediency which urge that Congress should be free to create non-Article III tribunals on behalf of "'specialized areas having particularized needs and warranting distinctive treatment.'" 458 US at 72 (citation omitted). The AGBCA and Federal Circuit erred in denying Article III rights to GTR.

B. This Court Should Review and Define Under the CDA the Proper Role of Agency Boards and Courts of Appeal.

1. The Majority's Decision Is Based upon an Original Finding of Fact Which Has No Support in the Record.

What a CO knew or understood is an issue of fact. Bromley Contracting Co., Inc. v. United States, 794 F2d 669, 672 (Fed Cir 1986). The majority mistakenly held, in the face of an unambiguous document and unchallenged trial admissions to the contrary, that the CO's written declaration that they had "no authority" did not reflect "a belief that he lacked authority to grant

an extension." (App A:19a-20a.) That finding is absolutely contradicted by the record. Further, it constitutes an impermissible original finding of fact by an appellate court on grounds never advanced by the government in its briefs, nor reached by the AGBCA.

The COs concluded their opinion letters denying Gregory's extension requests by stating unequivocally that each had "no authority" to extend or adjust the termination date. (Exs. 2, 5). The COs' testimony reaffirmed the plain statement of belief in "no authority."

> "Q Was it your understanding, then, that you had no authority to adjust or extend the contract?
>
> "A Yes, that's my understanding."
>
> * * * * *
>
> "Q I will repeat the question. Is it your understanding that you would have the authority to grant an extension or modification or adjustment to a green sale where the contractor agreed to

> perform a distress even though there was no intention to grant such an extension expressly stated in the prospectus or the documents of either contract?
>
> "A No, I don't have that authority. I administer the contract, period." (App L:96a-99a) (emphasis added).

In short, the record is uncontroverted that the COs believed they had "no authority."

2. An Appellate Court Cannot Supply an Original Finding of Fact to Sustain a Contracting Officer's Decision.

The majority's declaration that the CO did not mean what they said is a new and erroneous finding of fact without support in the record. Indeed, the claim that the CO did not mean what they said arose for the very first time through questions asked by the Federal Circuit during oral arguments. Had a finding been made by the AGBCA that "no authority" did not mean precisely that, such a finding could not have survived appellate review. 41 USC § 609(b). Where the finding was made originally by

the appellate majority, it is additionally erroneous as a de novo determination by an appellate court.

In Anderson v. City of Bessemer City, N.C., 470 US 564, 573, 105 S Ct 1504, 84 L Ed 2d 518 (1985), this Court held that an appellate court violates its permissible scope of factual review when it substitutes findings of its own for findings made by a district court. While this Court in Anderson was applying the "clearly erroneous" standard of review, its reasoning on the impropriety of de novo fact finding applies equally here. Indeed, consistent with Anderson and the scope of review permitted to it under the Contract Disputes Act, 41 USC § 609, the Federal Circuit has previously and repeatedly held that it cannot make de novo determinations of facts in appeals from agency boards. See, e.g., William F. Klingensmith, Inc. v. U.S., 731 F2d 805, 808-09 (Fed Cir 1984).

The AGBCA never made a finding on the issue and the government never argued at trial or in its appellate

briefs that the COs believed they had authority to extend. Consequently, GTR had no expectation that what the COs believed would be seized upon and decided by the appellate court. Chaos is invited under the CDA if a Court of Appeals may make original findings on such issues.

C. The Importance of This Case.

The very heart of the Contract Disputes Act is its assumption that contract disputes initially will be addressed on the merits by an independent CO. Where a CO misunderstands his authority and thus never addresses on the merits whether to extend a contract's term, how are courts to review a resulting default and damage determination? For thirty years the lower courts and boards have rejected defaults declared in this manner. John A. Johnson Contr. Corp. v. United States, 132 F Supp 698 (Ct Cl 1955); Schlesinger v. United States, 390 F2d 702 (Ct Cl 1968); Mid-South Contractors, Inc., 85-3 BCA (CCH) ¶ 18,210 (VABCA 1985). Here, however, the answer of the

AGBCA was to ignore the COs' misunderstanding and to place itself in their shoes and exercise discretion for them. The differing but equally unsatisfying answer of the Federal Circuit majority was to make an original finding of fact, contrary to the undisputed evidence from the COs' themselves. Neither answer is correct.

For the guidance of the government, contractors, boards, and courts, this Court should clarify and define under the Contract Disputes Act the appropriate roles of agency boards and the Federal Circuit when reviewing damage assessments based upon a CO's incorrect understanding of his authority.

It is also important for the Court to resolve whether the Congress may compel contractors to defend government money damage claims for simple breach of contract in Article I tribunals. It is likewise crucial that this court clarify

whether for purposes of Article III, only contractors in the Article I Claims Court can seek Article III guarantees.

CONCLUSION

A petition for certiorari should issue to the Federal Circuit.

Respectfully submitted,

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